

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANIEL HAMRICK)	
Claimant)	
VS.)	
)	Docket No. 183,004
ARABIAN HORSE EXPRESS)	
Respondent)	
AND)	
)	
FARMERS ALLIANCE MUTUAL)	
INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the Award dated August 28, 1995, entered by Administrative Law Judge Shannon S. Krysl. The Appeals Board heard oral argument on January 25, 1996.

APPEARANCES

Gregory G. Lower of Wichita, Kansas, appeared for the claimant. M. Doug Bell of Coffeyville, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the Appeals Board also considered Karen Terrill's report dated May 1, 1995, which the parties stipulated into the evidentiary record before the Administrative Law Judge.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 62 percent work disability. The respondent and its insurance carrier asked the Appeals Board to review the following issues:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of employment with the respondent.
- (2) Nature and extent of disability.
- (3) Whether the Administrative Law Judge erred by assessing the reporter's fees to the respondent and its insurance carrier.
- (4) Whether the Administrative Law Judge should have ordered respondent to pay claimant's medical expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified to increase claimant's work disability to 74 percent. In addition, the respondent and its insurance carrier should be ordered to pay the medical expense incurred by claimant.

(1) The Administrative Law Judge found that claimant sustained personal injury by accident arising out of and in the course of employment with respondent as the result of an acute inferior wall myocardial infarction which occurred on October 13, 1990. The Administrative Law Judge found claimant's infarction was directly traceable to and the product of unusual physical exertion caused by driving 14 hours the day before coupled with emotional stress generated by the receipt of adverse news regarding the respondent's publication. The Appeals Board agrees with that analysis.

The facts are not in dispute. On October 12, 1990, claimant drove most of a 14-hour trip to Jeffersonville, Indiana, to attend a national Arabian horse show. Also, on the evening of his arrival in Indiana, claimant received a stressful telephone call advising him both of foreclosure proceedings filed against the respondent and that the printer would not release respondent's magazine for circulation at the horse show.

In order for this claim to be compensable, claimant must prove that either unusual exertion or an external force or agency precipitated the myocardial infarction. The Administrative Law Judge found both of the specialists who testified, board-certified internist J. E. Block, M.D., and board-certified cardiologist and internist Joseph P. Galichia, M.D., causally related the infarction to the unusual exertion from the inordinately long drive and the emotional stress from the telephone call. The Appeals Board agrees with that conclusion.

Dr. Galichia was appointed by an administrative law judge to provide an independent medical evaluation. He examined claimant in April 1994. Regarding the relationship between claimant's long drive, the stressful telephone conversation, and the myocardial infarction, Dr. Galichia testified as follows:

"Q. (By Mr. Lower) . . . Doctor, based upon those facts, do you have an opinion within a reasonable degree of medical probability as to whether Mr. Hamrick was stressed when he received the phone call? . . .

"A. Well, in my opinion, this event and these circumstances, the long drive, bad news, dramatic bad news, set the stage for this gentleman to have a heart attack. And I see this a lot, patients who come in and say, you know, something horrible happened, a relative died, business reversal, and then that sets the stage for a series of events that leads to a heart attack. It may be a sudden thing or it may occur over 24 to 48 hours, and I think in this case, his physiologic response was one that predisposed him to having this coronary event.

"Q. What is the physiological response to stress?

"A. Well, one of them is a rise in blood pressure, for many people, not every person, but many people respond in this fashion. Another is to have spasm of arteries, including the arteries in the heart. This gentleman had documented disease in his heart, in his heart arteries, and if he incurred vasospasm in that setting, it could have closed this artery off and had a heart attack. Also, another response to stress is thickening of the platelets in the bloodstream that can lead to clotting, an outpouring of adrenalin that can lead on to sweating and make all these symptoms worse, so he is almost a textbook story of somebody who had that response to some terrible, terrible news. Would he have had the heart attack anyway, that's a question you might ask, I don't know. I think that all of these events, particularly given the fact that he had driven for a long distance, set the stage for this coronary problem.

"Q. What impact would a long trip like that have?

"A. Well, a lot of times when people drive a long period of time, certainly a lack of sleep, just a fatigue factor comes into play, it may be that sitting a long period of time and not drinking enough water, which I can only speculate about, some of those things can occur, and people who travel long distances, especially a straight through drive like that, that also predisposes the blood to clotting. . . .

"Q. (By Mr. Lower) In your opinion, there is -- those events had an impact on Mr. Hamrick's heart attack?

"A. Yes.

"Q. Do you think that they had a substantial impact?

"MR. BELL: I would object, it calls for speculation on the part of the witness.

"A. What do I do, answer that question?

"MR. BELL: Yes.

"MR. LOWER: Yes.

"A. Yeah. . . .

"A. Okay. Well, my feeling is that given the fact that he had some narrowing in his coronary arteries to begin with, that these events, because of the reasons I mentioned previously, set the stage for him to have a heart attack. In other words, all of these things collectively created enough stress and enough of a physiologic change, an alteration in his body physiology to cause this heart attack. I think that it's highly likely that there was a cause and effect."

Dr. Block, who is also a former medical professor and former acting chief of cardiology at the UMKC School of Medicine, testified as follows regarding the infarction's precipitating event:

"Q. (By Mr. Lower) Do you have an opinion, within a reasonable degree of medical probability, what caused Mr. Hamrick to have a heart attack in October of 1990?

"A. The straw that broke the camel's back was the acute psychological stress that was incurred during the time immediately prior to his heart attack.

"Q. What psychological stress?

"A. The giving the news of the bankruptcy and the fact that the magazines would not be delivered would cause a normal person to have a release of what we call catecholamines from the adrenal gland and other nerves in the body that would cause not only extreme vasoconstriction of the coronary vessels, but also make the blood thick, so to speak, and causing it to have a clot.

"Q. What impact, if any, did the fourteen hour trip have on Dan's physical condition?

"A. The 725 mile trip, non-stop, is traumatic to many people, and particularly people that are considered a hot reactor, type A personality, which Dan is. There are studies done that showed in traffic, this type of patient has a higher incidence of spasm of the coronary arteries, a higher incidence of abnormal heart beats because of the spasm and the release of the so-called catecholamines. . . .

"Q. (By Mr. Lower) Was Dan Hamrick more susceptible to having a heart attack after hearing the bad news over the phone as a result of making a fourteen hour car trip?

"MR. BELL: I object. Calls for speculation by this witness, which he's not qualified to answer.

"MR. PHALEN: Same objection from the Fund.

"Q. (By Mr. Lower) You may answer.

"A. Yes.

"Q. Why is that, Doctor?

"A. The fourteen hour car trip set the stage with gradual release of catecholamines for the acute coup de grace, which was the learning of the failure of the --

"(An off-the-record discussion was held, and the reporter read back the last answer.)

"Q. (By Mr. Lower) Had you completed your answer?

"A. Yes.

"Q. Doctor, when you wrote Exhibit No. 1, you had been treating Dan for approximately three years; is that correct?

"A. That's correct.

"Q. You state that you believe, and I quote, 'that stress was the precipitating cause of the disability due to the combination of the long drive and the bad news received by Mr. Hamrick by telephone.' Did I read that correctly?

"A. You did.

"Q. Did you voice that opinion within a reasonable degree of medical probability?

"A. I did.

"Q. Is there any way that you can tell whether the long drive or the bad news was more of the contributing factor for Dan's heart attack?

"A. The news, I feel, was more significant. But if he didn't have the long drive, perhaps that news would not have caused the heart attack."

The general rule governing coronary injury for this incident is contained in K.S.A. 1990 Supp. 44-501(e) which provides:

"Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment."

However, when the exertion which precipitated the injury exceeds the worker's usual work, the injury and disability may be compensable. Lentz v. City of Marion, 222 Kan. 169, 563 P.2d 456 (1977). Also, it is well settled that when it is established that the injury and resulting disability are the product of some external force or agency in the working environment then compensation for coronary injury may be compensable. Makalous v. Kansas State Highway Commission, 222 Kan. 477, 565 P.2d 254 (1977).

In dicta, the Kansas Supreme Court in Dial v. C. V. Dome Co., 213 Kan. 262, 515 P.2d 1046 (1973), indicated that anxiety and stress could constitute external force and an exception to the heart amendment contained in K.S.A. 44-501. Starting on page 267 of that decision, the Court said:

"Yet another analogy might be that a workman who is engaged in his customary duties, and putting forth only his customary exertion, when he is suddenly confronted by an armed assailant bent on robbery. If the workman succumbs to a physical attack his injuries are compensable. *Craig v. Electrolux Corporation*, 212 Kan. 75, 510 P.2d 138 (shooting); *Phillips v. Kansas City, L. & W. Rly. Co.*, 126 Kan. 133, 267 Pac. 4 (beating); *Stark v. Wilson, Receiver.*, 114 Kan. 459, 219 Pac. 507 (stabbing). But if the same workman has a weak heart which succumbs to the natural fear and anxiety engendered by the encounter, without physical trauma, are he or his dependents to be deprived of compensation merely because his *exertion* was not unusual? Again we think not; in such a case his exertion has nothing to do with his injury.

“We thus agree with the director’s conclusion; it was not the legislative intent that the amendment apply to this sort of case. Where the disability is the product of some external force or agency, and not of the exertion of the claimant’s work, the heart amendment has no applicability. In such a case, where exertion is not the agency ‘necessary to precipitate the disability,’ the usual vs. unusual exertion test applied in our previous heart amendment cases is irrelevant. Instead, the customary standards are to be applied in determining whether the injury was accidental, and whether it arose out of and in the course of the workman’s employment.”

Although the Kansas Supreme Court had the opportunity to retract or limit that dicta three years later in the case of Suhm v. Volks Homes, Inc., 219 Kan. 800, 549 P.2d 944 (1976), it did not. Instead of pronouncing that emotional stress and anxiety could not constitute either an external force or an exception to the heart amendment contained in K.S.A. 44-501, in that case the Court merely held that the medical testimony failed to establish that the alleged emotional stress was the external force or agency which precipitated claimant’s heart attack. By implication, it appears the Court has determined that stress may constitute external force.

The Appeals Board agrees with the Administrative Law Judge’s conclusion that the medical evidence supports a conclusion that claimant’s infarction was precipitated by the unusual exertion caused by the long drive and the inordinate stress caused by the late-night, business-related telephone conversation. Because claimant’s infarction was directly related to both unusual physical exertion and work-related anxiety, the Appeals Board finds that claimant’s myocardial infarction constitutes personal injury by accident arising out of and in the course of employment with respondent and that claimant is entitled to workers compensation benefits for that unfortunate event.

(2) The Appeals Board agrees with the Administrative Law Judge’s conclusion that claimant is entitled to an award of temporary total and permanent partial general disability benefits totaling \$100,000. The Judge’s conclusion regarding work disability is based upon a proper consideration of claimant’s residual physical abilities and the effect that claimant’s present heart condition has upon both his ability to perform work in the open labor market and his ability to earn a comparable wage.

Because his is an “unscheduled” injury, the computation of permanent partial disability benefits is governed by K.S.A. 1990 Supp. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee

has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

Dr. Galichia testified that claimant retains the ability to perform some simple, sedentary, non-stressful work. Based upon that medical opinion, respondent’s vocational rehabilitation expert, Karen Terrill, concluded that claimant had a 92 percent loss of ability to perform work in the open labor market. She also concluded claimant had retained the ability to earn \$6-8 per hour. Based on that testimony, claimant’s loss of ability to earn a comparable wage falls somewhere between 50 and 62 percent as indicated by the difference between claimant’s stipulated average weekly wage of \$634.62 and claimant’s present ability to earn between \$240 and \$320 per week.

Claimant’s labor market expert, Jerry D. Hardin, testified that he believed claimant had a 100 percent loss of ability to perform work in the open labor market and a 100 percent loss of ability to earn a comparable wage. Mr. Hardin based his opinions upon Dr. Block’s statements that claimant was totally disabled from managing a publication and that claimant was hypersensitive to stress. Because the Appeals Board finds that Dr. Galichia’s opinion is the more persuasive regarding claimant’s physical abilities and that claimant retains the ability to perform non-stressful, sedentary work, in this instance the Appeals Board rejects Mr. Hardin’s opinions.

Based upon the entire record, the Appeals Board finds that claimant has a 92 percent loss of ability to perform work in the open labor market and a 56 percent loss of ability to earn a comparable wage. Averaging those two losses yields a 74 percent work disability which the Appeals Board finds appropriate upon which to award claimant permanent partial general disability benefits.

(3) The Appeals Board also adopts the Administrative Law Judge’s determination that the court reporting costs should be assessed against the respondent and its insurance carrier. The Administrative Law Judge is empowered to assess the court reporter’s fees to either party. See K.S.A. 44-555. The Appeals Board also finds that all the administrative costs, including the court reporter’s fees, should be assessed to the respondent and its insurance carrier in this proceeding. Respondent’s argument that costs should be assessed against claimant because this claim was clearly not compensable under the Workers Compensation Act is not valid.

(4) The Appeals Board finds that respondent and its insurance carrier are required to pay the medical expense claimant incurred as a result of the myocardial infarction. Further, claimant may request the payment of future medical expense upon proper application to the Director. At regular hearing claimant introduced medical bills totaling \$39,635.80. Should any issue arise whether that medical expense is excessive or unjustified, the respondent and its insurance carrier may seek utilization and peer review as set forth in K.S.A. 44-510(a).

(5) The Appeals Board adopts the Administrative Law Judge's findings and conclusions as set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated August 28, 1995, entered by Administrative Law Judge Shannon S. Krysl should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Daniel Hamrick, and against the respondent, Arabian Horse Express, and its insurance carrier, Farmers Alliance Mutual Insurance Company, for an accidental injury which occurred October 13, 1990, and based upon an average weekly wage of \$634.62 for 359.71 weeks of permanent partial disability compensation at the rate of \$278 per week, for a 74% permanent partial general disability, making a total award of \$100,000.00.

As of January 15, 1997, there is due and owing claimant 326.57 weeks of permanent partial general disability compensation at the rate of \$278 per week for a total of \$90,786.46, which is ordered paid in one lump sum less any amounts previously paid. The remaining \$9,213.54 is ordered paid at the rate of \$278 per week for approximately 33.14 weeks until the total sum of \$100,000 in permanent partial disability benefits has been paid.

The respondent and its insurance carrier are ordered to pay the medical expense claimant has incurred with respect to this injury. In addition, claimant may request additional medical benefits upon proper application to the Director.

The Appeals Board hereby adopts the remaining orders set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: M. Doug Bell, Coffeyville, KS
Gregory G. Lower, Wichita, KS
Office of the Administrative Law Judge, Wichita, KS
Philip S. Harness, Director